LAKEFRONT RESIDENCE SDN BHD v. TETUAN LUI & BHULLAR & ORS

HIGH COURT MALAYA, KUALA LUMPUR
MOHD ARIEF EMRAN ARIFIN JC
[CIVIL SUIT NO: WA-22NCVC-830-12-2021]
29 DECEMBER 2021

Abstract – *(i) The overriding reason why the courts would choose either to allow or remove solicitors from acting for a particular party is whether there exists a risk that the administration of justice will be interfered and causes an unfair prejudice to a party to the whole process. As such risk does not appear in this case ie, that there was no breach of statutory duty or a conspiracy to injure, this is not an appropriate case for the interim restraining orders sought by the plaintiff against the solicitors from representing its clients; (ii) The rules under the Legal Profession (Practice and Etiquette) Rules 1978 and the Legal Profession (Publicity) Rules 2001 were created to regulate professional practice, etiquette, conduct and discipline of advocates and solicitors, not to protect a limited class of the public and not intended to create any statutory duty on advocates, that is enforceable by a private cause of action. Any complaint on conduct of any advocate should be referred to a Disciplinary Board and, where appropriate, be referred for any inquiry by a duly convened Disciplinary Committee. This is clearly provided in ss. 99 and 100 of the Legal Profession Act 1976.*

CIVIL PROCEDURE: *Injunction – Interim injunction – Application for – Application for interim injunction order against solicitors from representing purchasers of development in civil action until disposal of suit – Whether there was conspiracy to injure and breach of statutory duty – Whether solicitors acted in accordance with Legal Profession (Practice and Etiquette) Rules 1978 – Whether solicitors misled and misrepresented facts – Whether there was libel and slander – Whether there exists risk of interference with administration of justice or of unfair prejudice – Legal Profession Act 1976, ss. 99 & 100*

LEGAL PROFESSION: *Solicitors – Breach – Allegation of – Application for interim injunction order against solicitors from representing purchasers of development in civil action until disposal of suit – Whether there was conspiracy to injure and breach of statutory duty – Whether solicitors acted in accordance with Legal Profession (Practice and Etiquette) Rules 1978 – Whether solicitors misled and misrepresented facts – Whether there was libel and slander – Whether there exists risk of interference with administration of justice or of unfair prejudice – Legal Profession Act 1976, ss. 99 & 100*

The plaintiff sought, *inter alia*, the following orders from this court pursuant to O. 29 of the Rules of Court 2012 ('RC') (i) an interim injunction order against the defendants from operating and/or participating in any virtual platform, chat group directly or indirectly involving Lakefront Residence @ Cyberjaya till disposal of the suit; and (ii) an interim injunction order against the defendants from giving advice or representing any of the purchasers of Lakefront Residence @ Cyberjaya in any civil action till the disposal of this suit. The plaintiff's claim against the defendants arose out of the ashes of *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* and *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals.* Relying on the developments of the law in the above cases, the defendants had undertaken several public conferences *via* Zoom on 10 October 2001 and 23 October 2001. The defendants had reached out to the purchasers of the properties sold by the plaintiff and had suggested that the plaintiff had acted in breach of the Housing Development (Control and Licensing) Act 1966 ('Act'). The plaintiff contended that the defendants had suggested that the purchasers should institute proceedings against the former on the grounds of a breach of the Act and claim for liquidated ascertained damages that the defendants opined these purchasers were entitled to. The plaintiff, on the other hand, opined that it had not breached the Act and that the two referred cases were not applicable to the development as (i) the company had obtained consent of the Housing Controller to amend the terms of the standard sale and purchase agreement; (ii) that the sale and purchase agreements had incorporated the extended time frame of 54 months and this was agreed to by the purchasers; and (iii) that vacant possession was delivered by the plaintiff to the developers. The plaintiff's grouses against the defendants were (i) a claim based on the tort of conspiracy to cause injury to the plaintiff relating to the alleged instigation of the institution of proceedings by purchasers against the plaintiff; (ii) that the defendants were not acting in accordance with the Legal Profession (Practice and Etiquette) Rules 1978; (iii) that the defendants had misled and misrepresented the facts to the purchasers that the defendants were the leading lawyers in the important cases concerning breach of the Act and that the purchasers had valid claims against the plaintiff; and (iv) that there was libel and slander against the plaintiff.

Held (dismissing plaintiff's application with costs):

(1) The rules under the Legal Profession (Practice and Etiquette) Rules 1978 and the Legal Profession (Publicity) Rules 2001 were created to regulate the professional practice, etiquette, conduct and discipline of advocates and solicitors. They were not created to protect a limited class of the public and were not intended to create any statutory duty on

advocates that would be enforceable by a private cause of action. Any complaints on the conduct of any advocate should be referred to the Disciplinary Board and where appropriate be referred for any inquiry by a duly convened Disciplinary Committee. This is clearly provided in ss. 99 and 100 of the Legal Profession Act 1976. The plaintiff failed to show that there existed any valid form of claim for breach of the rules either premised as a breach of statutory duty or conspiracy to injure. (paras 29 & 31)

(2) It was strange that the plaintiff intended to pursue a claim for misrepresentation against the defendants for statements that were uttered not to the plaintiff and not relied upon by the plaintiff. The statements that the purchasers may have a valid cause of action against the plaintiff for breach of the Act were uttered to the purchasers and may have been relied upon by the purchasers, if any, in any retainers agreed between the purchasers and the said defendants. The cause of action, if any, lay with the purchasers and not with the company. The representations were made to the purchasers of the units sold by the plaintiff. There was no valid claim premised on the tort of deceit or misrepresentation that could be brought forth for trial. The plaintiff also failed to show that there existed any *bona fide* issue to be tried based on the tort of deceit or misrepresentation. (paras 33 & 35)

(3) It was important that this court did not deal with the issue of whether the plaintiff's contentions were correct or whether the defendants' contentions were correct concerning the alleged breach of the Act. That was the subject matter of the pending suit before the Shah Alam High Court between the purchasers and the plaintiff. It would be wrong for this court to stifle the right of the defendants to free speech. Especially, when the statements were made by the defendants in their capacity as solicitors to provide legal opinion and represent parties before the court. Until such a time that the said subject matter was heard and disposed of by the Shah Alam High Court, this court was in no position to make any such determination. It would be more appropriate to leave such issues now to be determined in the right forum. The plaintiff failed to show sufficient grounds justifying why the restraining order based on the claim of libel and slander should be allowed. (paras 44-46)

(4) The defendants had been retained as solicitors for the 192 purchasers of the properties sold by the plaintiff in the claim before the Shah Alam High Court. If this court granted the orders against the defendant, then the said defendants would not be entitled to represent the said purchasers and would be prevented from earning their livelihood as solicitors

qualified under the Legal Profession Act 1976. Such drastic orders should not be granted by this court. The extent of the orders sought by the plaintiffs would produce an unjust result. Essentially, the plaintiff was trying to scuttle the civil claim against them through the backdoor of a claim against the defendants, the solicitors acting for the said purchasers. Whether the claim is of merit should be left solely for the court hearing the said case and no backdoor attempt should be undertaken to deprive the said purchasers of their right to choose counsel of their own choice. The overriding reason why the courts choose either to allow or remove solicitors from acting for a particular party is whether there exists a risk that the administration of justice will be interfered and causes an unfair prejudice to a party to the whole process. Such risk does not appear in this case. Thus, the balance of convenience lay with the defendants. This was not an appropriate case for the interim restraining orders sought by the plaintiff. (paras 48-55)

Case(s) referred to:

Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals [2020] 1 CLJ 162 FC ***(refd)***

AV Asia Sdn Bhd v. Measat Broadcast Network Systems Sdn Bhd [2014] 1 CLJ 821 FC ***(refd)***

Crimmins v. Stevedoring Industry Finance Committee [1999] 200 CLR 1 ***(refd)***

Jefri Bolkiah v. KPMG [1998] UKHL 52 ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor & Ors [1995] 1 CLJ 293 CA ***(foll)***

Malaysia Offshore Mobile Production (Labuan) Ltd v. PCPP Operating Company Sdn Bhd & Ors [2022] 1 CLJ 440 HC ***(refd)***

Ngoi Thiam Woh v. CTOS Sdn Bhd & Ors [2001] 4 CLJ 765 HC ***(refd)***

PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals [2021] 2 CLJ 441 FC ***(refd)***

Plusbury Development Sdn Bhd v Goldpage Assets Sdn Bhd [2021] 1 LNS 1886 CA ***(refd)***

Rakusen v. Ellis Munday & Clarke [1912] 1 Ch 831 ***(refd)***

Shahidan Shafie v. Atlan Holdings Sdn Bhd & Anor [2017] 4 CLJ 587 CA ***(refd)***

Spincode Pty Ltd v. Look Software Pty Ltd [2001] VSCA 248 ***(refd)***

Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***

Tan Sri Dr Muhammad Shafee Abdullah v. Tommy Thomas & Ors [2021] 10 CLJ 1 FC ***(refd)***

The News Straits Times Press (M) Bhd v. Airasia Bhd [1986] 1 LNS 80 SC ***(refd)***

Tuan Hj Zulkifli Hj Hussain & Ors v. IOI Corporation Bhd & Ors [2012] 4 CLJ 401 HC ***(refd)***

Western Australia v. Ward [1997] FCA 585 ***(refd)***

X (minors) v. Bedfordshire County Council [1995] 2 AC 633 ***(refd)***

Yusoff v. Central Electricity Board [1964] 1 LNS 233 HC ***(refd)***

Legislation referred to:

Legal Profession Act 1976, ss. 77(1), 78, 94(2)(d), 99, 100

Legal Profession (Practice and Etiquette) Rules 1978, rr. 43, 51

Legal Profession (Publicity) Rules 2001, r. 5(1)(b)(v)

Rules of Court 2012, O. 29

For the plaintiff - Sivabalan & Goh Wan Ping; M/s Mastura Partnership
For the 1st defendant - Harneshpal Singh, Bryan Lui Shien Vieng & Chandni Anantha Krishnan; M/s Lui & Bhullar
For the 2nd defendant - In person
For the 3rd defendant - In person
For the 4th defendant - In person

Reported by Suhainah Wahiduddin

JUDGMENT
(encl. 3)

Mohd Arief Emran Arifin JC:

Background Facts

Plaintiff's Application For Interlocutory Injunction

[1] The plaintiff seeks, *inter alia*, the following orders from this court pursuant to O. 29 of the Rules of Court 2012:

(i) An interim injunction order against the defendants by themselves, their servants or agents from operating and or participating in any virtual platform, chat group directly or indirectly involving Lakefront Residence @ Cyberjaya till disposal of the suit.

(ii) An interim injunction order against the defendants by themselves, their servants or agents from giving advice and or representing any of the purchasers of Lakefront Residence @ Cyberjaya in any civil action till disposal of the suit.

Summary Of Plaintiff's Claim

[2] The plaintiff's claim against the defendants arises out of the ashes of *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* [2021] 2 CLJ 441 and *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162.

[3] Relying on the developments of the law in the above two referred cases, the defendants had undertaken several public conferences *via* Zoom on 10 October 2021 and 23 October 2021.

[4] The defendants had reached out to the purchasers of the properties sold by the plaintiff and apparently had suggested that the plaintiff has acted in breach of the Housing Development (Control and Licensing) Act 1966 as interpreted by the Federal Court in the above-referred cases.

[5] The plaintiff contends that the defendants have suggested that the purchasers should institute proceedings against the former on the grounds of breach of the said Act and claim for liquidated ascertained damages that the defendants opine these purchasers are entitled to.

[6] The plaintiff on the other hand opines that it has not breached the Housing Development (Control and Licensing) Act 1966. It also opines, as it appears in the statement of claim, that the two referred cases are not applicable to the development as (i) the company had obtained consent of the Housing Controller to amend the terms of the standard sale and purchase agreement; (ii) that the sale and purchase agreements had incorporated the extended time-frame of 54 months and this was agreed to by the purchasers; and (iii) that vacant possession was delivered by the plaintiff to the developers.

[7] After perusing the statement of claim filed by the plaintiff dated 21 December 2021, I summarise the plaintiff's claims or grouses against the defendants as follows:

(i) Conspiracy to injure:

(a) Instigated the purchasers to institute proceedings against the plaintiff for liquidated ascertained damages.

(b) Coaxed the purchasers to initiate proceedings and caused the plaintiff the need to defend possible action that may restrain access to the developer's account with the Ministry of Housing, stakeholder's account held with solicitors and sums deposited with the Commissioner of Building.

(c) Caused a strain on the relationship with the purchasers.

(ii) Acts not in accordance with Legal Profession (Practice And Etiquette) Rules:

(a) Lured the purchasers of the plaintiff to consider the liquidated ascertained damages that are allegedly due and payable to the plaintiff's purchasers.

(b) The defendants are guilty of touting and are guilty of rr. 43, 51 of the Legal Profession (Practice and Etiquette) Rules 1978 and r. 5(1)(b)(v) of the Legal Profession (Publicity) Rules 2001.

(iii) Misled and misrepresented the facts to the purchasers:

(a) Misled the plaintiff's purchasers that the defendants were the leading counsels in the important cases concerning the breach of the Housing Development (Control and Licensing) Act.

(b) Misled the purchasers into believing that they have a valid claim against the plaintiff.

(iv) Libel and slander against the plaintiff:

(a) The plaintiff also argues that the said defendants had defamed it when it made the following statements:

> Causes of Action
>
> POTENTIAL BREACH OF CONTRACT
>
> Breach of Clauses 25 and 27 of the Sales & Purchase Agreement
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> Clauses 25 and 27 of the Sale & Purchase Agreement are WRONG & ILLEGAL

A true and accurate translation of the said defamatory statement into national language are as follows:

> Kausa Tindakan
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> POTENSI PELANGGARAN KONTRAK
>
> Pelanggaran Klausa 25 dan 27 Perjanjian Jual Beli
>
> Klausa 25 dan 27 Perjanjian Jual Beli adalah
>
> SALAH & MENYALAHI UNDANG-UNDANG
>
> If you have received RM10,000 LAD, you are entitled to RM100,000, you can claim for RM90,000 notwithstanding that in that letter, settlement letter or waiver letter or LAD letter, it is stated that this is full and final settlement. *It does not matter.* You cannot, as a home buyer protected under the Housing Development Act, waive your rights to LAD, moving forward. So, *there is a potential breach of contract, Clause 25 and 27 have been breached and what we will ask and get from Court is liquidated ascertained damages calculated to you specifically, case to case basis.* As I have stated, you may not have the same booking fee day, you may not have the same purchase price and you may have a different vacant possession date although going through in the past few days I believe most of you have 01.04.2020 and 12.03.2020, moving forward. So, this is a strategy that, again, a template strategy that we adopt, moving forward. We do pre-trial discovery action, filing of the writ of summons and statement of claim and then, moving forward, either *we procure a settlement or we go all the wav and fight this out and the enforce the judgment of the High Court.*
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> (emphasis added)

[8] I had heard parties on 29 December 2021 and found that the plaintiff has failed to convince this court that the restraining orders sought should be granted in the circumstances of this case. I find that the plaintiff has failed to discharge the applicable test required as laid down in *Keet Gerald Francis Noel John v. Mohd Noor & Ors* [1995] 1 CLJ 293. My reasons for dismissing the plaintiff's application are as contained in the following paragraphs.

Applicable Law On Injunction

[9] As I have stated earlier, the applicable test is (laid down in *Keet Gerald Francis Noel John v. Mohd Noor & Ors* (*supra*) where Gopal Sri Ram JCA (as he then was) stated:

> To summarise, a judge hearing an application for interlocutory injunction should undertake an inquiry along the following lines:
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> first, he must ask himself whether the totality of the facts presented before him discloses a *bona fide* serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;
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> second, having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, *inter alia*, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the Judge would be entitled to dispense with the usual undertaking as to damages (see: *Cheng Hang Guan v. Perumahan Farlim (Penang) Sdn. Bhd.* 1988] 1 CLJ (Rep) 435; [1988] 3 MLJ 90). Apart from such cases, the Judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee;
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> thirdly, the Judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the *status quo*, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] AC

130 and applied in *Cheng Hang Guan* (*supra*). It is a judicial discretion capable of correction on appeal. Accordingly, the Judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiffs equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A Judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

[10] I also refer to the decision of the Federal Court in *AV Asia Sdn Bhd v. Measat Broadcast Network Systems Sdn Bhd* [2014] 1 CLJ 821 and the decision of the Court of Appeal in *Plusbury Development Sdn Bhd v. Goldpage Assets Sdn Bhd* [2021] 1 LNS 1886.

[11] I reproduce the summary of the applicable law as found by the Suraya Othman JCA in *Plusbury Development Sdn Bhd v. Goldpage Assets Sdn Bhd* (*supra*):

[31] It was our considered view that the decision of the learned Judge was correct as it was premised on the correct principle of law. The requirements in *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 CLJ 293; [1995] 1 MLJ 193 provides that:

(a) the plaintiffs claim must disclose a *bona fide* serious issue to be tried. At this interlocutory stage, the court is not required to make a final determination on the merits of the claim or the rights of the parties;

(b) they must then consider where the justice of the case lies. In doing so, the court must consider the harm that the injunction would produce by its grant and the harm that would result from its refusal and come to the conclusion as to which party would suffer greater injustice. In determining this, the court must consider whether damages would constitute an adequate remedy in respect of the plaintiff's claim. If damages are adequate, the court should not grant the injunction sought for; and

(c) if the relevant factors are evenly balanced, the court should maintain the *status quo.*

Application Of The Test To The Plaintiff's Application

Whether The Plaintiff Has Shown Any Bona Fide Serious Issue To Be Tried

[12] I am reminded that in considering this issue, I must "bear in mind that the pleadings and evidence are incomplete at this stage", and that I "must refrain from making any determination on the merits of the claim or any defence to it." I must however identify the issues raised in the pleaded case and those identified in the affidavits filed and decide "whether these are serious enough to merit a trial."

[13] As identified in para. 7 earlier, the plaintiff's claim is four-pronged. They are:

(i) a claim based on the tort of conspiracy to cause injury to the plaintiff relating to the alleged instigation of the institution of proceedings by purchasers against the plaintiff;

(ii) acts not in accordance with Legal Profession (Practice and Etiquette) Rules;

(iii) misled and misrepresented the facts to the purchasers that the defendants were the leading lawyers in the important cases concerning breach of the Housing Development (Control and Licensing) Act and that the purchasers have valid claims against the plaintiff; and

(iv) libel and slander against the plaintiff.

Plaintiff's Claim Based On The Tort Of Conspiracy And Breach Of The Legal Profession (Practice And Etiquette) Rules/Publication Rules

[14] I will first deal with items (i) and (ii) as identified above. The allegation based on the tort of conspiracy and the allegation for breach of the Legal Profession (Practice and Etiquette) Rules are interconnected with one another and should be dealt together with by this court.

[15] The plaintiff alleges that it is wrong for the defendants to have held conferences highlighting the developments of the law and the decisions of the Federal Court dealing with the validity of rulings made by the Housing Controller and the extension of time allowable under the Housing Development (Control and Licensing) Act.

[16] I note that the plaintiff submits paras. 33 to 103 of its written submissions that the defendants have allegedly committed the tort of conspiracy to injure and that the said defendants are guilty of breach of the Legal Profession (Practice and Etiquette) Rules as well as the rules concerning publicity as identified earlier.

[17] The allegation of the tort of conspiracy to injure is tied up to the alleged existence of a statutory duty of care owed to the plaintiff not to stir strive and litigation and not to breach the rules created under the Legal Profession Act. Essentially, the alleged conspiracy to injure is premised on the existence of an alleged statutory duty that the plaintiff contends exist pursuant to the breach of the said Rules of Practice and Etiquette and Publicity Rules.

[18] To answer the question of whether the Legal Profession Act and any rules that are made pursuant thereto, create any statutory duty that is enforceable by way of private action, I refer to the judgment of Lord Browne-Wilkinson in *X (minors) v. Bedfordshire County Council* [1995] 2 AC 633 where he stated:

This category comprises those cases where the statement of claim alleges simply (a) the statutory duty, (b) a breach of that duty, causing (c) damage to the plaintiff. The cause of action depends neither on proof of any breach of the plaintiffs' common law rights nor on any allegation of carelessness by the defendant.

The principles applicable in determining whether such statutory cause of action exists are now well established, although the application of those principles in any particular case remains difficult. *The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty*. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. *If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action: Cutler Wandsworth Stadium Ltd* [1949] AC 398: *Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2)* [1982] AC 173. However, the mere existence of some other statutory remedy is not necessarily decisive, it is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy. Thus the specific duties imposed on employers in relation to factory premises are enforceable by an action for damages, notwithstanding the imposition by the statutes of criminal penalties for any breach: see *Groves v. Lord Wimborne* [1898] 2 QB 402.

Although the question is one of statutory construction and therefore each case turns on the provisions in the relevant statute, it is significant that your Lordships were not referred to any case where it had been held that statutory provisions establishing a regulatory system or a scheme of social welfare for the benefit of the public at large had been held to give rise to a private right of action for damages for breach of statutory duty. Although regulatory or welfare legislation affecting a particular area of activity does in fact provide protection to those individuals particularly affected by that activity, the legislation is not to be treated as being passed for the benefit of those individuals but for the benefit of society in general. Thus legislation regulating the conduct of betting or prisons did not give rise to a statutory right of action vested in those adversely affected by the breach of the statutory provisions, i.e. book makers and prisoners: see *Cutler* [1949] AC 398; *Reg. v. Deputy Governor of Parkhurst Prison, Ex parte Hague* [1992] 1 AC 58. The cases where a private right of action for breach of statutory duty have been held to arise area all cases in which the statutory duty has been very limited and specific as opposed to general administrative functions imposed on public bodies and involving the exercise of administrative discretions. (emphasis added)

[19] I also refer to the decision of Ismail Khan J in *Yusoff v. Central Electricity Board* [1964] 1 LNS 233, where His Lordship stated:

> The *prima facie* rule was laid down in the case of *Doe d Bishop of Rochester v. Bridges* [1831] 1 B & A 847, 859 where Lord Tenterden said:
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> *Where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.*
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> This rule however always yields to the proper construction of the statute- see *Charlesworth on Negligence*, 3rd Edn., p. 448, article 718. The position is not free from difficulty judging from the decisions in the numerous cases on this point. Most of these were reviewed in the ewe of *Solomons v. Gertzenstein Ltd. & Ors.* [1954] 2 QB 243. *It seems that where the statutory obligation was imposed, primarily for the benefit of a particular class of persons, the penalty clause was held not to detract from the right of such persons to sue for a breach of the statutory duty.* See: *Couch v. Steel*, 3 E & B 402; *Britton v. Great Western Cotton Co* [1872] LR 7 Ex 130; *Groves v. Wimborne (Lord)* [1898] 2 QB 402; *Britannic Merthyr Coal Co. Ltd v. David* [1910] AC 74; *Dawson & Co. v. Bingley UDC* [1911] 2 KB 149; *Black v. Fife Coat Co. Ltd* [1912] AC 149; *Read v. Croydon Corp* [1938] 4 All ER 631; *Lavender v. Diamints Ltd* [1949] 1 KB 585; [1949] 1 KB 585.
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> On the other hand, there are cases where though the duty was clearly unposed for the benefit of a class, a member thereof injured by a breach of the duty was held to have no right of action - see *Atkinson v. Newcastle and Gateshead Waterworks Co.*, [1877] 2 Ex D 441; and *Johnson v. Consumers' Gas Co. of Toronto* [1898] AC 447.
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> In the following cases it was held that where the obligation was of a public nature and imposed in the interests of the public at large an individual had no right of action. See: *Phillips v. Britannia Hygienic Laundry Co, Ltd* [1923] 2 KB 832; *Square v. Model Farm Diaries (Bournemouth) Ltd* [1939] 2 KB 365; *Badham v. Lambs Ltd* [1946] KB 45; *Clarke v. Brims* H9471 KB 497; *Cutler v. Wandsworth Stadium Ltd* [1949] AC 398.
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> This principle does not appear to have been followed in the case of *Monk v. Warbey* [1935] 1 KB 75 where a person although not a member of any particular class was held entitled to recover damages for a breach of the Road Traffic Act, 1930.
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> It seems therefore in the present state of the authorities that – "No universal rule can be formulated which will answer the question whether in any given case an individual can sue in respect of a breach of statutory duty", per Romer LJ in *Solomons v. Gertzenstein Ltd & Ors* [1954] 2 QB 243 cited above, p. 266.
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> To find the answer in this case, it is necessary to study the Ordinance and its regulations. (emphasis added)

[20] It would be remiss of me not to refer to the judgment of Nallini Pathmanathan J (as she then was) in *Tuan Hj Zulkifli Hj Hussain & Ors v. IOI Corporation Bhd & Ors* [2012] 4 CLJ 401.

[21] In the aforementioned case, the High Court had to consider whether there existed a private cause of action for breach of the Securities Commission Malaysia Act 1993 and the Malaysian Code on Take-Overs and Mergers 1987.

[22] Her Ladyship had undertaken a detailed sweep of the common law and prominent legal writings on this area and succinctly summarised the applicable law as follows:

> [42] From the foregoing cases, the guiding principles to be gleaned are that:
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> (a) As a general rule 'where an Act creates an obligation and enforces the performance in a specified manner ... that performance cannot be enforced in any other manner.' (see Lord Tenterden CJ in *Doe d Bishop of Rochester v. Bridges* [1831] 1 B & Ad 847);
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> (b) Lord Diplock in *Lonrho v. Shell Petroleum Co.* (above) recognised two exceptions to this general rule, the first exception being relevant here, namely where the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals. The second exception relates to a situation where the statute creates a public right, which is not directly relevant in the context of the present case;
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> (c) The fact that a statute was unquestionably passed for the protection of a specific class of individuals is not conclusive, for example, child protection legislation: see *X (minors) v. Bedforshire CC* [1995] 3 WLR 152 (above).
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> (d) Where the statute imposes a duty and provides an adequate remedy for its breach of some other means of enforcement, this militates against the existence of an action for breach of statutory duty. Conversely where the statute does not provide a remedy the assumption is that there will be a cause of action for a breach of the duty entitling the person injured to compensation or damages.
>
> (e) Where it seems that breach of the statute is actionable, the circumstances in which the claimant sustains harm must fall within the terms of the defendant's statutory duty. Additionally, the damage suffered by the claimant must be of the kind that the statute was intended to prevent.

[23] The above was adopted with full approval by the Court of Appeal in *Shahidan Shafie v. Atlan Holdings Sdn Bhd & Anor* [2017] 4 CLJ 587.

[24] I also refer must also be made to the judgment of the Australian High Court in *Crimmins v. Stevedoring Industry Finance Committee* [1999] 200 CLR 1 where Gleeson CJ stated:

> 93. In my opinion, therefore, in a novel case where a plaintiff alleges that a statutory authority owed him or her a common law duty of care and breached that duty by failing to exercise a statutory power, the issue of duty should be determined by the following questions:
>
> 1. Was it reasonably foreseeable that an act or omission of the defendant, including a failure to exercise its statutory powers, would result in injury to the plaintiff or his or her interests? If no, then there is no duty.
> 2. By reason of the defendant's statutory or assumed obligations or control, did the defendant have the power to protect a specific class including the plaintiff (rather than the public at large) from a risk of harm? If no, then there is no duty.
> 3. Was the plaintiff or were the plaintiff's interests vulnerable in the sense that the plaintiff could not reasonably be expected to adequately safeguard himself or herself or those interests from harm? If no, then there is no duty.
> 4. Did the defendant know, or ought the defendant to have known, of the risk of harm to the specific class including the plaintiff if it did not exercise its powers? If no, then there is no duty.
> 5. Would such a duty impose liability with respect to the defendant's exercise of "core policy-making" or "quasi-legislative" functions? If yes, then there is no duty.
> 6. Are there any other supervening reasons in policy to deny the existence of a duty of care (e.g., the imposition of a duty is inconsistent with the statutory scheme, or the case is concerned with pure economic loss and the application of principles in that field deny the existence of a duty)? If yes, then there is no duty.
>
> 94. If the first four questions are answered in the affirmative, and the last two in the negative, it would ordinarily be correct in principle to impose a duty of care on the statutory authority.

[25] To ascertain whether the breaches of rr. 43, 51 of the Legal Profession (Practice and Etiquette) Rules 1978 and r. 5(1)(b)(v) of the Legal Profession (Publicity) Rules 2001 create a private cause of action as suggested by the plaintiff, I will have to consider the following statutory provisions appearing in the said Act. They are reproduced herein for ease of convenience:

(i) Section 77(1) of the Legal Profession Act 1976:

> (1) Without prejudice to any other power to make rules provided under this Act, the Bar Council may, with the approval of the Attorney General make rules for regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors.

(ii) Section 94 of the Legal Profession Act 1976:

(1) All advocates and solicitors shall be subject for the purposes of all disciplinary actions to the control of the Disciplinary Board.

(2) Any advocate and solicitor who has been guilty of any misconduct shall be liable to one or more of the following penalties or punishments:

(a) to be struck off the Roll;

(b) to be suspended from practice for any period not exceeding five years;

(c) to be ordered to pay a fine not exceeding fifty thousand ringgit; or

(d) to be reprimanded or censured.

(3) For the purposes of this Part, "misconduct" means conduct or omission to act in Malaysia or elsewhere by an advocate and solicitor in a professional capacity or otherwise which amounts to grave impropriety and includes:

(a) conviction of a criminal offence which makes him unfit to be a member of his profession;

(b) breach of duty to a court including any failure by him to comply with an undertaking given to a court;

(c) dishonest or fraudulent conduct in the discharge of his duties;

(d) breach of any rule of practice and etiquette of the profession made by the Bar Council under this Act or otherwise;

(e) being adjudicated a bankrupt and being found guilty of any of the acts or omissions mentioned in paragraph 33(6)(a), (b), (c), (e), (f), (h), (k) or (l) of the Bankruptcy Act 1967;

(f) the tendering or giving of any gratification to any person for having procured the employment in any legal business of himself or any other advocate and solicitor;

(g) directly or indirectly procuring or attempting to procure the employment of himself or any other advocate and solicitor through or by the instruction of any person to whom any remuneration for obtaining such employment has been given by him or agreed or promised to be so given;

(h) accepting employment in any legal business through a tout;

(i) allowing any unauthorised person to carry on legal business in his name without his direct and immediate control as principal or without proper supervision;

(j) the carrying on by himself, directly or indirectly, of any profession, trade, business or calling which is incompatible with the legal profession or being employed for reward or otherwise in any such profession, trade, business or calling;

(k) the breach of any provision of this Act or of any rules made thereunder or any direction or ruling of the Bar Council;

(l) the disbarment, striking off, suspension or censure in his capacity as a legal practitioner in any other country or being guilty of conduct which would render him to be punished in any other country;

(m) the charging, in the absence of a written agreement, in respect of professional services rendered to a client, of fees or costs which are grossly excessive in all the circumstances;

(n) gross disregard of his client's interests; and

(o) being guilty of any conduct which is unbefitting of an advocate and solicitor or which brings or is calculated to bring the legal profession into disrepute.

(4) Where an advocate and solicitor:

(a) has been found guilty by a court of law of any offence involving dishonesty, misuse or misappropriation of any money or property of a client or of any other person;

(b) has been disbarred, struck off, suspended, reprimanded or censured in his capacity as a legal practitioner in any other country;

(c) is the subject of a complaint concerning any dishonest act committed by him in his capacity as an advocate and solicitor;

(d) has left the country or has not attended at his office in such circumstances that the Bar Council may reasonably presume that he has absconded; or

(e) is otherwise incapable from infirmity of body or mind or any other cause of effectively performing the functions of an advocate and solicitor, and the Bar Council considers that it would be in the public interest or in the interest of his clients or of the profession that such advocate and solicitor be suspended from practice, the Bar Council may apply to the Disciplinary Board for an order suspending such advocate and solicitor from practice until further notice.

(4A) Notwithstanding subsection (2), any registered foreign lawyer who has been guilty of any misconduct shall be liable to be suspended, for any period not exceeding five years, or revocation of his registration or reprimanded or censured or ordered to pay a fine, as the case may be.

(5) A pupil shall *mutatis mutandis* be subject to the same control by the Disciplinary Board as is by virtue of this section exercised over, and any reference to advocate and solicitor in this Part shall *mutatis mutandis* include a pupil but *in lieu* of an order striking him off the Roll or suspending him, an order may be made prohibiting the pupil from proceeding with any petition for admission until after a date to be specified in the order.

(6) For the purpose of this section, "pupil" includes a person who has completed the prescribed period of pupillage and has yet to be admitted as an advocate and solicitor.

(iii) Section 99 of the Legal Profession Act 1976:

(1) Any complaint concerning the conduct of any advocate and solicitor or of any pupil shall be in writing and shall in the first place be made or referred to the Disciplinary Board which shall deal with such complaint in accordance with such rules as may from time to time be made under the provisions of this Part.

(2) Any court including the Industrial Court and a Syariah Court, Judge, Sessions Court Judge or Magistrate or the Attorney General may at any time refer to the Disciplinary Board any complaint against an advocate and solicitor or a pupil.

(3) Nothing in this section shall be taken to preclude the Bar Council or a State Bar Committee from making any complaint of its own motion to the Disciplinary Board against an advocate and solicitor or a pupil.

(3A) No complaint concerning the conduct of any advocate and solicitor or of any pupil shall be inquired into by the Disciplinary Board after the expiration of six years from the date when the right of action to bring the complaint accrued:

Provided that where:

(a) the complaint is based upon the fraud of the advocate and solicitor or his agent or of any person through whom he or his agent claims; or

(b) the right of action to bring the complaint is concealed by the fraud of the advocate and solicitor or of his agent or any person through whom he or his agent claims, the period of limitation shall not begin to run until the complainant has discovered the fraud, or could with reasonable diligence have discovered it

(4) Where a complaint is made against a legal firm, it shall be deemed to be a complaint made:

(a) in the case of a sole proprietorship, against the advocate and solicitor who was at the material time the sole proprietor of the legal firm; or

A (b) in the case of a partnership, against all the advocates and solicitors who were at the material time partners of the legal firm, unless the legal firm satisfies the Disciplinary Board of the identity of the advocate and solicitor in the legal firm against whom the complaint has arisen.

B (5) Where at any stage of the proceedings the Disciplinary Board is satisfied that a complaint made against a legal firm should be directed against a particular advocate and solicitor, the Disciplinary Board shall forthwith replace the name of the legal firm with the name of the advocate and solicitor concerned.

C (6) For the purpose of this section, "legal firm" includes an international partnership or a qualified foreign law licensed under Part IVA.

(iv) Section 100 of the Legal Profession Act 1976:

(1) Where a written application or complaint is made or referred to the D Disciplinary Board, the Disciplinary Board shall, if it is satisfied that:

(a) there is no merit in the application or complaint, dismiss the application or complaint and notify the complainant and the advocate and solicitor of its decision; or

(b) there is merit in the application or complaint:

E (i) post or deliver to the advocate and solicitor concerned a copy of the application or complaint together with all supporting documents, if any, furnished to the Disciplinary Board; and

(ii) request the advocate and solicitor to furnish his written explanation in quadruplicate together with supporting F documents, if any, within fourteen days of the request or within such longer time as the Disciplinary Board may allow.

(2) Where the advocate and solicitor does not furnish his written explanation to the Disciplinary Board as requested under sub-paragraph (1)(b)(ii), the Disciplinary Board shall proceed to G appoint a Disciplinary Committee.

(3) Where the advocate and solicitor has furnished his written explanation to the Disciplinary Board under sub-paragraph (1)(b)(ii), the Disciplinary Board shall review the matter and:

(a) if it is satisfied that there is no merit in the application or H complaint, dismiss the application or complaint and notify the parties accordingly; or

(b) if it is still of the view that there is merit in the application or complaint, proceed to appoint a Disciplinary Committee.

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(4) Notwithstanding subsection (2) and paragraph (3)(b), if the Disciplinary Board considers that the application or complaint may be dealt with summarily, it shall give a written notice to the advocate and solicitor to determine whether the advocate and solicitor agrees that the application or complaint be dealt with summarily.

(5) If the advocate and solicitor fails to respond within fourteen days from the date of the notice referred to in subsection (4), the Disciplinary Board shall proceed to appoint a Disciplinary Committee.

(6) If the advocate and solicitor agrees that the application or complaint be dealt with summarily, the Disciplinary Board may, having ascertained that the advocate and solicitor understands the nature and consequences of the application or complaint being dealt with summarily, proceed to do so.

(7) After dealing summarily with the application or complaint, the Disciplinary Board may impose one or more of the following penalties or punishments:

(a) reprimand or censure the advocate and solicitor;

(b) impose a fine:

(i) not exceeding five thousand ringgit on the advocate and solicitor if no cause of sufficient gravity exists for a formal inquiry; or

(ii) not exceeding fifty thousand ringgit on the advocate and solicitor where the advocate and solicitor has admitted to the misconduct or the material facts establishing the misconduct or where the material facts establishing the misconduct are evident and do not warrant further inquiry;

(c) suspend the advocate and solicitor from practice or in the case of a foreign lawyer, recommend to the Bar Council for his suspension, as the case may be, for such period not exceeding five years as the Disciplinary Board deems appropriate in the circumstances; or

(d) strike the advocate and solicitor off the Roll or in the case of a foreign lawyer, recommend to the Bar Council for the revocation of his registration.

(8) Notwithstanding subsection (7), the Disciplinary Board may also make an order of restitution of the complainant's monies if it is established that such monies were or are held by the advocate and solicitor in his professional capacity and the complainant is entitled to the return of such monies or part thereof.

(9) Before imposing any one or more of the penalties or punishments under subsection (7) or making an order of restitution under subsection (8), the Disciplinary Board shall notify the advocate and solicitor of its intention to do so and give him a reasonable opportunity to be heard.

(10) An order of restitution made pursuant to subsection (8) shall be deemed to be an order of the High Court and be enforced accordingly by the complainant.

(11) If the advocate and solicitor does not agree that the application or complaint be dealt with summarily, the Disciplinary Board shall proceed to appoint a Disciplinary Committee pursuant to section 103A.

(12) The Disciplinary Board may, at any stage after an application or a complaint has been received, require the production of such further documents or explanations from either the complainant or the advocate and solicitor or both or from such other person as the Disciplinary Board may require, and the parties to the application or complaint shall be provided with all such documents or explanations.

(13) Any advocate and solicitor or any other person who without reasonable excuse refuses or fails to produce to the Disciplinary Board any document or fails to give any information which may relate to or be connected with the subject matter of the complaint shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding two thousand ringgit or to a term of imprisonment not exceeding three months or to both.

(14) The Disciplinary Board may, at any stage of an inquiry into an application or complaint, determine that a formal inquiry is required and appoint a Disciplinary Committee accordingly.

(15) Nothing in this section shall preclude the Disciplinary Board from dismissing an application or complaint at any stage.

[26] Having considered the above statutory provisions, I am of the opinion that the Legal Profession Act and the rules identified by the plaintiff do not create an actionable private cause of action as suggested by the plaintiff.

[27] It is clear to me that s. 94(2)(d), s. 99 and s. 100 of the Legal Profession Act 1976 provide for specific mechanisms to address any breach of the rules by an advocate. Parliament intended that such issues and any complaints against an advocate or even against a pupil should be referred to the Disciplinary Board and where appropriate be referred for an inquiry by a duly convened Disciplinary Committee.

[28] I also do not find that the said rules were created to protect a limited class of the public and that the Legislature intended to confer on members of that class a private right of action for breach of the above-referred rules.

This is to be contrasted to the Solicitors' Account Rules 1990 which was enacted in accordance with the powers afforded to the Bar Council under s. 78 of the Legal Profession Act 1976. The Solicitors' Account Rules were created to protect the interest of clients and parties where trust monies were paid and to be retained on trust. If there was a breach of the Solicitors' Account Rules, it is arguable that a private cause of action for breach of the said duty will be enforceable against an advocate who may have failed to comply with the said rules.

[29] However, I do not find that the same can be said of any breach of the rules appearing under the Legal Profession (Practice and Etiquette) Rules 1978 or under the Legal Profession (Publicity) Rules 2001. These rules were created to regulate the professional practice, etiquette, conduct and discipline of advocates and solicitors. As I have stated earlier, they were not created to protect a limited class of the public and were not intended to create any statutory duty on advocates that would be enforceable by a private cause of action. To repeat, any complaints on the conduct of any advocate should be referred to the Disciplinary Board and where appropriate be referred for an inquiry by a duly convened Disciplinary Committee. This is clearly provided in s. 99 and s. 100 of the Legal Profession Act 1976.

[30] I am further fortified by the decision of the Federal Court in court in *Tan Sri Dr Muhammad Shafee Abdullah v. Tommy Thomas & Ors* [2021] 10 CLJ 1, where on the issue of the interpretation to be afforded towards the powers of investigation of any complaints by the Disciplinary Board, Abdul Rahman Sebli FCJ stated:

> [40] It needs to be emphasised that s. 99(1) of the LPA is a special provision that deals specifically with complaints of misconduct by advocates and solicitors whereas s. 64(6) is a general provision that deals generally with motions to be considered at the AGM. Applying the *maxim generalia specialibus non derogant*, s. 64(6) being a general provision must give way to the special provision of s. 99(1). Like any other legislation passed by Parliament, s. 99(1) must be given a construction that will give effect to its object rather than to defeat it.
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> [41] From a plain reading of the provision, it is clear that Parliament's intention in enacting s. 99(1) was to leave it entirely to the Disciplinary Board to deal with all matters concerning the conduct of advocates and solicitors or pupils, hence the direction in imperative terms that the complaint "shall" in the first place be made or referred to the Disciplinary Board. This is to ensure that the disciplinary process is not contaminated by any premature finding of guilt in whatever form by any other body before the complaint is brought before the Disciplinary Board. There is nothing in the LPA that gives the Malaysian Bar the right to place before the floor of the AGM any complaint concerning the conduct of an advocate and solicitor by way of a motion under s. 64(6). In fact, it points in the opposite direction.

A [42] It is trite law that where an Act creates an obligation and enforces the performance in a specified manner, it must be taken as a general rule that performance cannot be enforced in any other manner: See *Doe D Bishop of Rochester v. Bridges* [1831] 1 B &AD 847 per Lord Tenterden CJ.

[31] Therefore, despite the plaintiff's consternation as to the conduct of the B defendants and the allegations that they had breached the rules identified earlier, I am of the view that the plaintiff has failed to show that there exists any valid form of claim for breach of the rules either premised as a (i) breach of a statutory duty; or (ii) conspiracy to injure as alleged in the statement of claim. I reiterate, that I am aware that I should not make any determination C on the merits of the claim, but on the face of the pleaded case, I am unable to find any valid claim premised on the breach of the aforesaid rules. Any breach of such rules should be dealt with in accordance with s. 99 and s. 100 of the Legal Profession Act 1976.

The Defendants Had Misled The Purchasers To Believe That They Were D Material Counsels In The Earlier Suits Or That The Purchasers Have A Valid Claim Against The Plaintiff

[32] The plaintiff's second cause of action against the defendants is premised on the contention that the defendants had misled the purchasers into believing that (i) that the defendants had senior roles in the suits referred E to at paras. 56 of the plaintiff's claims; and (ii) that the purchasers may have a valid cause of action against the plaintiff for breach of the Housing Development (Control and Licensing) Act.

[33] I find it strange that the plaintiff intends to pursue a claim for misrepresentation against the defendants for statements that were uttered not F to the plaintiff and not relied upon by the plaintiff. These statements were uttered to the purchasers and may have been relied upon by the purchasers, if any, in any retainers agreed between the purchasers and the said defendants.

G **[34]** The elements required to be shown in a claim based on the tort of deceit were explained by the Federal Court in *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381. Gopal Sri Ram FCJ, eruditely explained:

> [24] The "fraud" of which Lord Halsbury spoke in *Salomon v. A Salomon & Co Ltd* includes equitable fraud. In the recent Australian case of *The Bell Group Ltd (In liquidation) v. Westpac Banking Corporation (No 9)* [2008] WASC H 239; 70 ACSR 1, Owen J discussed the distinction between equitable fraud and fraud at common law. His Honour said:
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> 4849. One of the leading Australian texts on equitable principles is R Meagher, D Heydon and M Leeming, Meagher, Gummow and Lehane's *Equity Doctrines and Remedies* (4th ed 2002). When I refer to this I text from time to time in these reasons I will do so by the shortened

phrase 'Meagher, Gummow and Lehane'. At [12-050] the authors set out a non-exhaustive list of factual and legal situations that have traditionally been treated as species of equitable fraud. They include:

(a) misrepresentation by persons under an obligation to exercise skill and discharge reliance and trust (for example in fiduciary relationships), and inducements to contract or otherwise for the representee to act to his detriment in reliance on the representation;

(b) the use of power to procure a bargain or gift, resulting in disadvantage to the other party;

(c) conflict of interest against a duty arising from a fiduciary relationship; and

(d) agreements which are *bona fide* between the parties but in fraud of third persons.

4850. All of these categories can be seen, to varying degrees, in the claims brought by the plaintiffs in the equitable fraud causes of action. The last category is of particular interest because it encompasses the imposition and deceit species referred to as the Earl of Chesterfield fourth limb. I will come to that doctrine shortly.

22.2.1.2. Equitable fraud and common law fraud compared

4851. The term common law fraud is often used to describe the tort of deceit, or the making of fraudulent misrepresentations. The tort of deceit is said to encompass cases where the defendant knowingly recklessly makes a false statement, with the intention that another will rely on it to his or her detriment.

4852. *Derry v. Peek* [1889] UKHL 1; [1889] 14 App Cas 337 illustrates the principle that honesty is a duty of universal obligation, existing independently of contract or fiduciary obligations. In *Derry v. Peek*, the House of Lords rejected the argument that a claim of negligence would support an action for fraudulent misrepresentation. In so doing, their Lordships set the standard for common law fraud. *Lord Herschell said, at 374, that to succeed, a plaintiff must prove 'that a false representation has been made (1) knowingly, or (2) without belief in its truth or (3) recklessly, careless whether it be true or false'. In other words, there must be a lack of an honest belief in the truth of the representation. In Armitage v. Nurse [1997] EWCA Civ 1279; [1998] Ch 241; [1997] 3 WLR 1046, Milled LJ discussed the meaning of 'actual fraud' in the context of an exemption clause. At 1053, his Lordship described actual fraud as connoting, at least, 'an intention on the part of the trustee to pursue a particular course of action, either knowing that it is contrary to the interests of the beneficiaries or being recklessly indifferent whether it is contrary to their interests or not.*

4853. This, then, marks out a significant difference between common law fraud and equitable fraud. The latter does not require proof of an actual intention to deceive.

To summarise, a plea of fraud at common law will not succeed absent proof of an intention to deceive. Such an intention is not an ingredient of equitable fraud which is, essentially speaking, unconscionable conduct in circumstances where there exists or is implied or imposed a relationship of trust or confidence. (emphasis added)

[35] Even if the plaintiff's contentions are true, the cause of action if any lies with the purchasers and not with the company. The representations were made to the purchasers of the units sold by the plaintiff. They were not made to the plaintiff and were not relied upon by the said company. I do not see any valid claim premised on the tort of deceit or misrepresentation that could be brought forth for trial as suggested in the statement of claim.

[36] Given the above, I find that the plaintiff also fails to show to this court that there exists any *bona fide* issue to be tried based on the tort of deceit or misrepresentation.

Claim Based On Libel And Slander

[37] The final claim relied on by the plaintiff concerns the alleged libel and slander put forward by the learned counsel for the litigant at paras. 104 to 117 of the plaintiff's written submissions.

[38] The principles applicable in an application for an interim injunction concerning a claim for libel and slander are trite. I make reference to the judgment of Abdul Hamid Ag LP in *The News Straits Times Press (M) Bhd v. Airasia Bhd* [1986] 1 LNS 80; [1987] 1 MLJ 36, where His Lordship stated:

> However, in deciding whether or not to grant an interlocutory injunction the Court must exercise its discretion judicially. It is of cardinal importance to bear in mind that:
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> *"Because of the court's reluctance to fetter free speech and because the questions that arise during the proceedings, such as whether the meaning is defamatory, whether justification or fair comment are applicable and as to malice, are generally for the jury, interlocutory injunctions are granted less readily in defamation proceedings than in other matters and according to different principles." Halsbury's Laws of England, 4th Edition, Vol. 28, para 167. (See Quartz Hill Consolidated Gold Mining v. Beall (1882) 20 Ch D 501).*
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> In *Bonnard v. Perryman* [1891] 2 Ch 269, 284, Lord Coleridge CJ delivering the judgment of the Court in which Lord Esher MR, and Lindley, Bowen and Lopes LJJ concurred, emphasised that:
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> *The right of free speech is one which it is for the public interest that individuals should possess, and indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions.* We entirely approve of, and desire to adopt as our own, the language of Lord Esher, MR in *Coulson v. Coulson*? 'To justify the Court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury have decided whether it was a libel or not. Therefore, the

jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the Court would set aside the verdict as unreasonable.

Bonnard's case and *Monson v. Tussauds Ltd* [1894] 1 QB 671 were followed in *Crest Homes Ltd v. Ascott* [1980] FSR 396, where the trial Judge granted an interlocutory injunction against the defendant who said that he would justify his assertions. Allowing the appeal and discharging the injunction, the Court (CA) held:

(1) There was no reason to depart from the general rule that an interlocutory injunction will not be granted against a defendant in a libel action if he intends to plead justification unless the plaintiff can prove that the statement is untrue;

(2) The plaintiff had not shown that the defendant's statement was untrue.

Lord Justice Geoffrey Lane, sitting with Lord Denning MR and Lord Justice Stephenson, stated that:

> the line of authority is long and weighty that interlocutory injunctions in these cases will not be granted unless the plaintiff shows that the defence of justification will not succeed.

Authorities do also show that the principle that there shall be no interim injunction if defence is raised "applies not only to the defence of justification" (*Bonnard v. Perryman*), "but also to the defence of privilege" (*Quartz Hill Consolidated Gold Mining v. Beall* (1882) 20 Ch D 501, and "fair comment" (*Fraser v. Evans & Ors* [1969] 1 QB 349). "In accordance with the long-established practice in defamation action, the principles enunciated by the House of Lords in *American Cyanamid v. Ethicon Ltd* [1975] AC 396 relating to interim injunctions are not applicable in action for defamation. (*Herbage v. Pressdram Ltd* [1984] 1 WLR 1160, 1162.

In our judgment the learned Judge had erred in law when he exercised the power to grant interlocutory injunction contrary to the established principle governing the issue of interim injunctions in libel actions. He should not therefore have granted the interim injunction against a defendant who has specifically pleaded justification and had raised as a defence fair comment on a matter of public interest.

The principle has clearly emerged by reason of the fact that the questions of libel or no libel are eminently matters to be decided on facts at the trial and there is also the question of the proper meaning to be assigned to the words used in a particular statement. To restrain a defendant before the questions are determined would amount to fettering with free speech. Indeed it is because of the importance of leaving free speech unfettered that the Court must be slow in issuing interim injunction in a libel action.

In applying these principles, value is placed by the Court upon the freedom of speech which is related to the freedom of the press when balancing it against the reputation of a single individual who, if wronged, can be adequately compensated in damages. The Court should act

cautiously in granting interim injunction to restrain publication of an alleged defamatory statement. In fact, it should not grant the injunction where the defendant says he is going to justify it at the trial of the action except where the statement is obviously untruthful or where the plaintiff has satisfied the Court that the defence will fail. That was made clear by Denning MR in Harakas v. Baltic Exchange [1982] 2 All ER 701, 703.

(emphasis added)

[39] The other leading case that is commonly quoted on this area, is the judgment of Abdull Hamid Embong J (as he then was) in *Ngoi Thiam Woh v. CTOS Sdn Bhd & Ors* [2001] 4 CLJ 765; [2001] 4 MLJ 510.

[40] I find that as a general rule, an interim restraining order should not be entered against a defendant in a defamation suit, especially when the defence of qualified privilege, fair comment, justification or even the *Reynold's* defence may potentially be raised unless I am satisfied that:

(i) that the statement is unarguably defamatory;

(ii) there are no grounds for concluding that the statement may be true;

(iii) there is no other defence which might succeed; and

(iv) there is evidence of an intention to repeat or publish the defamatory statement.

[41] The statements complained by the plaintiff concerning the allegation are *inter alia* as follows:

(i) they are guilty of breaching the Housing Development (Control and Licensing) Act;

(ii) that the sale and purchase contracts executed by the plaintiff and the purchasers are contrary to the decision of the Federal Court in *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* [2021] 2 CLJ 441 and *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162;

(iii) that cl. 25 and cl. 27 of the sale and purchase agreement executed are unlawful and illegal;

(iv) that the plaintiff did misrepresent and/or deprived the purchasers of their entitlement to the full liquidated damages; and

(v) that the plaintiff had acted unlawfully by delivering vacant possession within 54 months instead of 36 months as required under the Schedule H of the aforementioned Act.

[42] The defendants have yet to file their defence to the claim. However, in their affidavit in reply they have exhibited to this court a copy of the writ action, bearing number BA-22NCVC-509-12-2021, filed before the High Court of Malaya at Shah Alam, where they have instituted proceedings, on behalf of the purchasers, against the plaintiff alleging that the latter is in breach of the Housing Development (Control and Licensing) Act and will be relying on the aforementioned Federal Court decisions to seek further liquidated damages against the developer.

[43] This indicates to me that the defendants intend to argue that the statements are true and not defamatory. These also appear at paras. 27 of the defendants' affidavit in reply.

[44] It is important that I do not deal with the issue of whether the plaintiff's contentions are correct or whether the defendants' contentions are correct concerning the alleged breach of the Housing Development (Control and Licensing) Act. That is the subject matter of the pending suit before the High Court of Malaya at Shah Alam between the purchasers and the plaintiff. I will leave that said issue to be determined by the High Court hearing that case.

[45] In the circumstances, I find based on the authorities referred by me at paras. 37 and 38 earlier, it would be wrong for this court to stifle the right of the defendants to free speech. Especially, when the statements were made by the defendants in their capacity as solicitors to provide legal opinion and present parties before the court. Until such a time that the said subject matter is heard and disposed of by the High Court of Malaya at Shah Alam, I am in no position to make any such determination and it would be more appropriate to leave such issues now to be determined in the right forum.

[46] Given the above, I find that the plaintiff has also failed to show to this court sufficient grounds justifying why the restraining order based on the claim of libel and slander should be allowed. This case does not fall under any of the exceptions to the general rule as identified earlier.

Justice Of The Case/Balance Of Convenience – Whether The Harm That The Injunction Would Produce By Its Grant And The Harm That Would Result From Its Refusal

[47] Even if I am wrong on the above, I am of the opinion that the balance of convenience lies in favour of the defendants.

[48] At this juncture, the defendants have been retained as solicitors for the 192 purchasers of the properties sold by the plaintiff in the claim before the High Court of Malaya at Shah Alam.

[49] If I grant the orders against the defendants, then the said defendants will not be entitled to represent the said purchasers and will be prevented from earning their livelihood as solicitors qualified under the Legal Profession Act.

[50] I am also of the opinion that such drastic orders should not be granted by this court and that the extent of the orders sought by the plaintiff will produce an unjust result. Essentially, the plaintiff is trying to scuttle the civil claim against them through the backdoor of a claim against the defendants, the solicitors acting for the said purchasers. Whether the claim is of merit should be left solely for the court hearing the said case and I believe no backdoor attempt should be undertaken to deprive the said purchasers of their right to choose counsel of their own choice.

[51] I am aware that this court has inherent jurisdiction to restrain advocates and solicitors from acting for a particular party to a litigation. This power has been exercised where it is shown that (i) there is a danger of misuse of confidential information; (ii) where there is a potential breach of fiduciary duty of loyalty not to act against a client, or against a former client in the same matter or closely related matter and under the inherent jurisdiction to prevent abuse of process or to ensure due to administration of justice. Please refer to the decision of the Victoria Supreme Court in *Spincode Pty Ltd v. Look Software Pty Ltd* [2001] VSCA 248, the English House of Lords in *Jefri Bolkiah v. KPMG* [1998] UKHL 52, the Federal Court of Australia in *Western Australia v. Ward* [1997] FCA 585 and an old English case of *Rakusen v. Ellis Munday & Clarke* [1912] 1 Ch 831.

[52] When I consider these cases, the common theme that one could gather from them is that the overriding reason why the courts chose either to allow or remove solicitors from acting for a particular party is whether there exists a risk that the administration of justice will be interfered and causes an unfair prejudice to a party to the whole process. As an example, a former client is entitled to expect that all disclosures done during the course of the engagement will not be utilised to the advantage of the latter when his former solicitors are subsequently engaged against him or her. Such a risk may not arise when the last engagement had nothing to do with the dispute at hand as seen in *Malaysia Offshore Mobile Production (Labuan) Ltd v. PCPP Operating Company Sdn Bhd & Ors* [2022] 1 CLJ 440.

[53] Such risk does not appear in this case. The solicitors were not engaged by the plaintiff in any form and were not in any fiduciary relationship with the company. They also do not have access to any confidential information obtained in their course as counsel or solicitors of the plaintiff. As I have said earlier, the plaintiff's consternations are concerning the defendants' active attempts to persuade their purchasers to sue them. They complain that these

are contrary to the Rules of Etiquette and Publicity Rules of the Malaysian Bar. As I have said earlier, this should be addressed at the right forum under s. 99 and s. 100 of the Legal Profession Act.

[54] Therefore, even if I am wrong on the issues raised in paras. 13 to 45 earlier, I also find that the balance of convenience in this case lies with the defendants for the above reasons.

[55] I do not find that this is an appropriate case for the interim restraining orders sought by the plaintiff.

Orders Of This Court

[56] For the above reasons, I dismiss the plaintiff's application with costs in the cause.